No. 15010

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD O. BOREN CONTRACTING CO., INC., a California corporation; CLIFFORD O. BOREN, President, CLIFFORD O. BOREN CONTRACTING CO., INC., and DELTA M. BOREN, Vice-President, CLIFFORD O. BOREN CONTRACTING CO., INC.,

Appellants,

vs.

LLOYD M. TUCKER, Special Agent, Internal Revenue Service,

Appellee.

On Appeal from the United States District Court
for the Southern District of California
Southern Division

OPENING BRIEF FOR THE APPELLANTS

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NAMES AND ADDRESSES OF ATTORNEYS

Attorney for Appellants:

JOHN A. BRANT,
1216 Bank of America Building,
San Diego 1, California.

Attorneys for Appellee:

CHARLES K. RICE,
Asst. U. S. Attorney General,

LEE A. JACKSON,
Attorney, Dept. of Justice,
Washington 25, D.C.,

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Asst. U. S. Attorney, Chief Tax Division,
600 Federal Building,
Los Angeles 12, California

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OPINION BELOW

The Findings of Fact and Conclusions of Law [R. 48-62] of the District Court are not officially reported.

Appellants to appear before the Court and produce for examination, copying and photostating or photographing the records called for in the summonses. [R. 74]

Appellants appeared before the District Court, as directed, and produced said records, but failed and refused to obey the order of the Court commanding them to produce said records for examination, copying and photostating or photographing. Thereupon, the District Court found Appellants, and each of them, in contempt of the District Court and committed Appellants Clifford O. Boren and Delta M. Boren to the custody of the United States Marshal and assessed a compensatory fine of $110.00 against Appellant Corporation. [R. 76]

Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291. The order is final and appealable. *Chapman v. Goodman,* U.S. Court of Appeals, Ninth Circuit, 219 F. 2d 802.

Appellants filed notice of appeal on December 13, 1955. [R. 81]

Appellants made a cash deposit of $1,000.00 in lieu of a supersedeas bond, which was approved by the Court, [R. 72] and the Court made its order staying execution of the judgment. [R. 79]

On January 3, 1956, Appellants filed a designation of contents of record on appeal and reporter's transcripts of proceedings. On January 13, 1956, Appellee filed an additional designation of contents of record on appeal.

The record was prepared by the Clerk of the United States District Court, who filed the same with the Clerk of the United States Court of Appeals for the Ninth Circuit on January 26, 1956. [R. 82, 215] Appellants filed a statement of points on appeal in the United States Court of Appeals for the Ninth Circuit on February 2, 1956. [R. 218]

QUESTIONS PRESENTED

1. Whether in an action to enforce administrative summonses *duces tecum* issued by a special agent of the Internal Revenue Service, a defense is sufficient which alleges facts showing that because of previous examinations the examination sought by the summonses is unnecessary and unreasonable in scope.

2. Whether a Revenue Agent who has made a complete and detailed examination of a taxpayer's books and records, and has had full opportunity to examine the books and records, and they were repeatedly made available to him, may make a re-examination of such records in connection with the same taxpayers and taxable years, without the Secretary of the Treasury, or his delegate, requiring it (a) after investigation, and (b) when it is a necessity, and (c) after written notice, all of which are required by Section 7605(b), IRC 1954.

3. Whether under Section 7602, IRC 1954, which authorizes a Revenue Agent to "examine" a taxpayer's books and records, a Revenue Agent, after making a detailed examination of the books and records, may require that they be photographically reproduced for his further use.

4. Whether under Section 7602, IRC 1954, which authorizes a Revenue Agent to examine a taxpayer's books of account for the purpose of ascertaining the correctness of an income tax return, this authority also permits a Revenue Agent to make an examination for the admitted purpose of securing evidence for a criminal prosecution.

5. Whether the authority in Section 7602, IRC 1954, to examine books and records is limited to those which are material or relevant to the inquiry into the correctness of the return under investigation, and if so, whether Appellee has sustained his burden of proving that the books and records which he demands are material or relevant to the tax liability of the persons liable therefor and that the books and records contain items relating to the business of the person liable for the tax.

6. Whether an examination of a taxpayer's books and records is permitted after the expiration of the Statute of Limitations without a definite factual showing that fraud is the issue of the renewed inquiry.

7. Whether the failure to comply with an administrative summons is contemptuous conduct so that in an action to enforce such summons an order to show cause why the summoned person should not be held in civil contempt for failure to obey such summons states a claim upon which such person could be held in civil contempt.

STATUTES INVOLVED

The pertinent statutes are printed in the Appendix, *infra.*

STATEMENT

Appellants Clifford O. Boren and Delta M. Boren are president and vice-president, respectively, of Appellant Clifford O. Boren Contracting Co., Inc., a California corporation. Appellee, Lloyd M. Tucker, is a Special Agent of the Internal Revenue Service. [R. 49]

Agents of the Bureau of Internal Revenue commenced the examination of the Federal Income Tax Returns of Appellants Clifford O. Boren and Delta M. Boren for the taxable years 1950 and 1951 on or about November 2, 1953. [R. 108] Internal Revenue Agent Henry Miller and Internal Revenue Agent Charles D. Ford were engaged in the examination. [R. 118] On or about April 28, 1954, Internal Revenue Agent Charles D. Ford requested that a Special Agent be assigned to co-operate in the investigation and on or about May 11, 1954 Appellee was so assigned. [R. 108]

Internal Revenue Agent Charles D. Ford resigned from the service on September 10, 1954. On October 6, 1955, Appellant Delta M. Boren, through her attorneys, reported irregularities on the part of Internal Revenue Agent Ford after he had left the service. [R. 108-109] On October 6, 1955 the case was reassigned to Internal Revenue Agent Forrest P. Calkins. [R. 108] On October 20, 1954, Appellee and Internal Revenue Agent Forrest P. Calkins communicated with Appellants' counsel. [R. 11] At that time Internal Revenue Agent Calkins stated that he wanted to start from "scratch." [R. 109] Appellee commenced his examination of the tax liability of Appellants Clifford O. Boren and Delta M. Boren for the years 1950 and 1951 on

October 20, 1954. [R. 11] On or about December 7, 1954 Appellee and Revenue Agent Calkins commenced the examination of the returns of Appellants Clifford O. Boren and Delta M. Boren for the years 1950-1951. [R. 109] On that date Appellee and Revenue Agent Calkins demanded that Appellant Corporation make available to them the books, papers, records and other data of Appellant Corporation for the fiscal year July 1, 1951 to April 30, 1952, to be used by them in ascertaining the tax liability of Appellants Clifford O. Boren and Delta M. Boren for the years 1950 and 1951, and in the examination of the tax liability of Appellant Corporation for the fiscal year ended April 30, 1952. [R. 109] During the period December 7, 1954 to July 15, 1955, the books and records of Appellant Corporation were continuously under examination by Appellee and Revenue Agent Calkins for the purpose of ascertaining the tax liability of each of the Appellants for said taxable years. [R. 51, 59]

In the conduct of the examination of Appellant Corporation's books and records in connection with the matter of the tax liability of Appellants Clifford O. Boren and Delta M. Boren and Appellant Corporation, Appellee and Revenue Agent Calkins had available for examination, and did examine, the general journal, cash journal, general ledger, payroll records, and *all* of the payroll checks of Appellant Corporation for the period July 1, 1951 to April 30, 1952. [R. 52] Revenue Agent Calkins examined and made extensive notes and transcripts from said books and records, and the payroll records and checks and made abstracts of information from these records and checks. [R. 52]

Appellee had full opportunity to make a complete examination of the payroll checks. [R. 120]

In the examination of the payroll checks by Appellee, Appellee extracted therefrom the dates of the checks, the names of the payees, the bank endorsements, the names of individuals appearing on the reverse side of the checks, the amount of the checks, and the bank on which the checks were drawn. [R. 136-137]

Appellee and Revenue Agent Calkins were examining the payroll checks in February, 1955. Based upon information obtained from the checks they conducted further investigation. [R. 140] During the course of the investigation, and sometime in March, 1955, Appellee was informed that one of the persons carried on the payroll of Appellant Corporation as an employee and with respect to whom the payroll records indicated weekly payroll checks had been issued during the period June 29, 1951 to December 5, 1951, was not an employee of the Corporation and did not receive the wages shown as paid to her in the books and records. [R. 52] Since receiving that information, Appellee did not obtain any further information in derogation of the payroll deductions. [R. 128]

The Commissioner of Internal Revenue has issued Notices of Deficiencies for Clifford O. Boren and Delta M. Boren for the taxable year 1951. In said Notices of Deficiencies, fraud penalties were asserted. On or about July 22, 1955 the taxes, interest and fraud penalties proposed in said notices were assessed by the Commissioner. [R. 56] The Notices of Deficiences were based upon the informa-

tion obtained by Appellee and Revenue Agent Calkins in the examination of the books and records of Appellant Corporation, and upon the information obtained by Appellee in the examination of the payroll records and checks. [R. 126, 128] The Notices of Deficiencies contained adjustments made as a result of the information obtained concerning the "employee" above mentioned. [R. 44, 128] On July 15, 1955, the Commissioner of Internal Revenue issued a Notice of Deficiency to Appellant Corporation for the fiscal year July 1, 1951 to April 30, 1952. Included within the deductions disallowed by said Notice of Deficiency are the salaries and wages of the "employee" referred to above. [R. 44]

During the period between March, 1955 to July 15, 1955 the books and records now sought by Appellee were available to Appellee for examination. [R. 141] These records remained available to Appellee and Revenue Agent Calkins until they informed Appellants' counsel that they were finished with them. [R. 42, 110] On July 11, 1955, Appellee again requested all the payroll checks and records of Appellant Corporation for the fiscal year July 1, 1951 to April 30, 1952. Said checks and records were delivered to Appellee and Revenue Agent Calkins on July 13, 1955. When the payroll records and payroll checks were again delivered to Appellee and Revenue Agent Calkins, they demanded possession thereof for the purpose of photographically reproducing said records. This demand was refused and Appellee and Revenue Agent Calkins thereupon stated that they did not need to examine said records. [R. 140-141]

On July 20, 1955, Appellee again demanded examination

of said payroll records and checks. At this time a Notice of Deficiency had been issued by the Commissioner to each Appellant. Appellee acknowledged that he did not want to examine the records and checks for the purpose of adjusting or changing the Notice of Deficiency. [R. 57-58]

Appellee testified that his principal purpose in seeking this examination was to photograph or photostat certain of the payroll checks to determine the validity of the endorsements on those checks, and, whether there had been forgeries of those checks. [R. 130] In issuing the summonses, one of the purposes which Appellee had in mind was assisting in the preparation of a criminal case against Appellants Clifford O. Boren and Delta M. Boren. [R. 134]

Counsel for Appellee admitted, after the filing of Appellee's petition and prior to the hearing thereon, that the copying of the payroll checks, either photographically or through some photostatic process, would make unnecessary any further investigation by Appellee into the books and records of Appellant Corporation. [R. 147]

On August 25, 1955, Appellee issued summonses to Appellants to appear before Appellee to testify and to produce for examination the General Journal, Cash Journal, General Ledger, Payroll Records and Payroll Checks bearing the endorsement of any of the following named persons: Clifford O. Boren, Delta M. Boren, Marjorie H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Company, Inc., for the period from July 1, 1951 to December 31, 1951, in the matter of the tax liability of Appellants Clifford O. Boren and Delta M. Boren for the

calendar years 1950 and 1951. [R. 50, 53] Appellants had possession, care and custody of said books and records. [R. 49-50]

A joint income tax return of Appellants Clifford O. Boren and Delta M. Boren for the calendar year 1950 was filed on or prior to March 15, 1951. These Appellants signed a waiver of the Statute of Limitations for the calendar year 1950, which waiver extended the time for assessment to June 30, 1955. [R. 55] Appellants Clifford O. Boren and Delta M. Boren made and filed income tax returns for the calendar year 1951 on or prior to March 15, 1952.

The lower court found that Appellee has reasonable cause to believe that Appellants Clifford O. Boren and Delta M. Boren may have filed for the calendar years 1950 and 1951 false or fraudulent returns with intent to evade the tax or may have willfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code. [R. 50, 59] The lower court also found that the purpose of Appellee's examination was to determine the correctness of the tax returns filed by Appellants Clifford O. Boren and Delta M. Boren with respect to possible assertion of additional assessments by reason of fraud and fraud penalty assessments and with respect to possible criminal tax liability of said Appellants. [R. 58]

The lower court also found that the books and records sought by the summonses are material and relevant to the matter of the income tax liability of Appellants Clifford O. Boren and Delta M. Boren for the calendar year 1951. [R. 59, 60] The lower court did not find that said books

and records were material and relevant to the matter of the income tax liability of said Appellants for the calendar year 1950.

None of the Appellants has requested a re-examination of Appellant Corporation's book of account. Neither the Secretary of the Treasury, nor his delegate, after investigation, has notified Appellant Corporation in writing that an additional examination is necessary.

Appellee moved to strike all of Appellants' separate defenses set forth in their answer to Appellee's petition on the ground that the separate defenses were "wholly irrelevant" to the issues presented. [R. 115] The lower court granted Appellee's motion to strike from the answer the Second and Ninth separate defenses and denied the motion as to the other separate defenses, Third to Eighth, inclusive. [R. 75-76]

ARGUMENT

I

IN AN ACTION TO ENFORCE ADMINISTRATIVE SUMMONSES DUCES TECUM ISSUED BY A SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE, A DEFENSE IS SUFFICIENT WHICH ALLEGES FACTS SHOWING THAT BECAUSE OF PREVIOUS EXAMINATIONS, THE EXAMINATION SOUGHT BY THE SUMMONSES IS UNNECESSARY AND UNREASONABLE IN SCOPE.

Appellee repeatedly had available for examination and did examine and make extensive notes and transcripts

from the books and records now sought by his summonses. The examination was made by him in connection with the tax liability of Appellants Clifford O. Boren and Delta M. Boren for 1950-1951, and Appellant Corporation for the fiscal year ended April 30, 1952. The only records which Appellee in fact wants to examine are the payroll checks described in the summonses. These checks likewise were repeatedly made available to Appellee for examination, and were extensively examined by him. These facts were alleged in Appellants' Second Separate Defense. [R. 19-24]

It is Appellants' contention here that the facts alleged in this defense show that because of the nature and extent of the previous examinations of the books and records, the further examination sought by the summonses is unnecessary, and is unreasonable in scope. The lower court granted Appellee's motion to strike this defense, apparently on the ground that it did not allege facts sufficient to constitute a defense. [R. 75-76]

Section 7605(b) of the Internal Revenue Code provides: "No taxpayer shall be subjected to unnecessary examination or investigations, . . ." The language of the present Section 7605(b) has been substantially the same since its first enactment in the Revenue Act of 1921 and decisions interpreting the prior enactments should be applicable to the present provision.

The meaning of this section is reasonably clear. Unnecessary examinations are forbidden. This prohibition is addressed to the Secretary of the Treasury under whose authority all examinations are made. The prohibition is a Congressional safeguard of the right to be free from un-

necessary examinations and is stated in absolute terms. This right is further fortified by the additional provision contained in Section 7605(b) that " . . . only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise, or unless the Secretary, or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary." *Pacific Mills v. Kenefick,* 99 F. 2d 188 (CCA-1)

Even where the Secretary or his delegate has given written notice that a second examination is necessary, he may not make a second examination unless such examination is in fact necessary. The Secretary or his delegate clearly has no right to impose additional examinations in disregard of the statute and an examination ordered by the Secretary without any necessity therefor is an arbitrary abuse of power. *Pacific Mills v. Kenefick,* 99 F. 2d 188 (CCA-1)

Section 7602, IRC 1954, as here applicable, provides that the Secretary or his delegate is authorized to make an examination "For the purpose of ascertaining the correctness of any return . . ." The necessity for the additional examination sought by Appellee must be judged with this purpose in mind.

The facts alleged in Appellants' Second Separate Defense show that the additional examination is not for the stated purpose and is not necessary.

The granting of Appellee's motion to strike this defense was inconsistent with the lower court's own obser-

vation in connection with Appellee and his prior examinations of the records: "If he had them twice available the burden is on petitioner to show a necessity for a third examination." [R. 135] Appellants respectfully submit that the allegations in Appellants' Second Separate Defense, if true, demonstrate a lack of necessity for the additional examination by Appellee and constitute a proper defense to Appellee's petition.

Martin v. Chandis Security Co., 128 F. 2d 731, CCA-9

Local 174, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America et al., v. U. S.,.....F. 2d....., CCA-9, No. 14,746, December 7, 1955.

The previous examinations by Appellee render the summonses too broad in scope. Since Appellee has conducted a comprehensive examination into the books and records now sought, he is in a position to specify with particularity the items and documents he needs to examine. A general exploratory examination is not justified under the circumstances. Appellee should be required to specify the individual items and documents which he now needs to examine. This would permit a critical and intelligent examination of the specific items and documents to determine if they contain entries relative to the business of the Borens and whether such entries are material or relevant to their tax liability.

Appellants have alleged that the only records which Appellee wants to examine are the payroll checks specified in the summonses. [R. 23-24] This was admitted by counsel for Appellee. [R. 147]

In view of these circumstances, the summonses are too broad in scope and are oppressive. This is a proper defense to an action to enforce administrative summonses.

Martin v. Chandis Securities Co., 33 F. Supp. 478

Local 174, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America et al., v. U. S., ... F. 2d ....., CCA-9, No. 14, 746, December 7, 1955.

II

WHERE A REVENUE AGENT HAS MADE A COMPLETE AND DETAILED EXAMINATION OF A TAXPAYER'S BOOKS AND RECORDS, AND HAS HAD FULL OPPORTUNITY TO EXAMINE THE BOOKS AND RECORDS, AND THEY WERE REPEATEDLY MADE AVAILABLE TO HIM, A RE-EXAMINATION OF SUCH RECORDS IN CONNECTION WITH THE SAME TAXPAYERS AND TAXABLE YEARS MAY NOT BE MADE UNLESS THE SECRETARY OF THE TREASURY, OR HIS DELEGATE, REQUIRES IT (A) AFTER INVESTIGATION, AND (B) WHEN IT IS A NECESSITY, AND (C) AFTER WRITTEN NOTICE, ALL OF WHICH ARE REQUIRED BY SECTION 7605(b), IRC 1954.

Section 7605(b) provides that ". . . only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

None of the Appellants has requested a re-examination. Neither the Secretary of the Treasury, nor his delegate, after investigation, has notified Appellant Corporation in writing that an additional examination is necessary. [R. 58]

A complete and detailed examination of the books of account of Appellant Corporation has been made by Appellee and Revenue Agent Calkins in connection with the tax liability of Appellants Clifford O. Boren and Delta M. Boren for the calendar years 1950-1951, and in connection with the tax liability of Appellant Corporation for the fiscal year ended April 30, 1952.

As a result of these examinations, Notices of Deficiency were issued to each of the Appellants, and in each notice, a fraud penalty was asserted. Appellee testified that since receiving information about an "employee" of Appellant Corporation in March, 1955, he has obtained no other information in derogation of the payroll deductions. The examination sought by Appellee is not for the purpose of changing the Notice of Deficiency.

Only one inspection of a taxpayer's books of account for each year shall be made unless the Secretary requires it (a) after investigation, and (b) when it is a necessity, and (c) after written notice.

Not only has there been no notice as required by Section 7605(b), but there is also no evidence of any investigation subsequent to the examination of the books and records, and no evidence that the re-examination is necessary for the purpose of determining the correctness of the returns of Appellants.

The Secretary of the Treasury has no authority to impose examinations in disregard of this statute. Even if a notice were given by the Secretary, unless there is a necessity for the examination, there is an arbitrary abuse of power. *Pacific Mills v. Kenefick*, 99 F. 2d 188, (CCA-1)

The prohibitions of Section 7605(b) apply equally to examinations of the books and records of the person liable for the tax and examinations of books and records of a person other than the one liable for the tax. These prohibitions are a limitation upon the power of the Treasury Department and not merely a right assertable only by the person against whom a tax liability is being investigated. The Ninth Circuit Court in *Martin v. Chandis Securities Co.*, 128 F. 2d 731, said (at 128 F. 2d 735) as to the limitation imposed by this section (then section 3631):

> "The question is whether in investigating the return of one taxpayer, the Bureau may investigate the books of a third person regardless of whether the investigation is necessary or not. In other words, is Section 3631 a limitation on the power of the Bureau, or is it merely a personal right available only to the taxpayer? We believe it is the former and that the Bureau has no power to make an unnecessary examination or investigation."

See also *In the Matter of Clarence Wood and Mary L. Wood*, (U.S. District Court, WD of Ky.) 130 F. Supp. 121, where the Court adopted the view expressed in *Martin v. Chandis Securities Co.*, supra, and said that " . . . whatever limitations upon the Bureau's power have been placed in the statute apply to all persons thus subpoenaed."

Appellee's petition refers only to the tax liability of Clifford O. Boren and Delta M. Boren. [R. 4] However, Appellee summoned Appellants Clifford O. Boren, Delta M. Boren and Appellant Corporation. [R. 5] It is clear from the affidavit of Appellee in support of his petition that the examination sought by him relates also to the Appellant Corporation. [R. 35, 59] The prohibitions of Section 7605(b) would therefore be applicable whether the examination sought is considered to be an examination of the books of account of the person liable for the tax or the books of account of a third party.

The question arises as to whether or not there has been "one inspection" of Appellants' books of account for the fiscal year ended April 30, 1952, as that term is used in Section 7602.

Admittedly a detailed, extensive examination was made. The records now sought were carefully examined by Appellee and Revenue Agent Calkins. They were repeatedly made available to them. Detailed abstracts were made. Based upon information thereby obtained, Notices of Deficiency were issued, which asserted deficiencies and fraud penalties. These notices are determinations of the tax liabilities of Appellants. The deficiencies asserted for the year 1951 against Appellants Clifford O. Boren and Delta M. Boren have been assessed. The normal three year statute of limitations had run prior to the time Appellee issued his summonses. Is this "one inspection of a taxpayer's books of account"? Appellee says no and the lower court concluded that it was not. This conclusion was based upon Appellee's assertion, otherwise

unsupported, that the examination of Appellants' books of account had not been completed. [R. 140]

The import of the lower court's conclusion is that so long as a revenue agent is willing to assert that his examination is not completed, one inspection of a taxpayer's books of account has not been made and the restrictions imposed by Congress are inapplicable. This has the result of abrogating the statutory prohibitions and permitting the person who is to exercise the power to be the judge of the length and breadth of this authority. On the theory asserted by Appellee and adopted by the lower court, Appellants could be subjected to repeated and continued examinations for as long as any revenue agent desired to pursue Appellants. This would be without limitation as to time for there can never be a "final determination" of a tax liability for a taxable year if at any time fraud is asserted.

Appellants respectfully suggest that the limitation of "one inspection" of a taxpayer's books of account is not to be determined by the subjective standard of the revenue agent's desires, but rather from the nature and extent of the actual examination made.

The zeal of revenue agents, regardless of how motivated, is commendable but it should be exerted within the statutory framework. It must be recalled that the principles expressed in the Fourth and Fifth Amendments to the Constitution of the United States were conceived as a result of the abuses the colonists experienced with revenue officers.

III

WHERE SECTION 7602, IRC 1954, AUTHORIZES A REVENUE AGENT TO "EXAMINE" A TAXPAYER'S BOOK AND RECORDS, THE REVENUE AGENT MAY NOT AFTER MAKING A DETAILED EXAMINATION OF THE BOOKS AND RECORDS REQUIRE THAT THEY BE PHOTOGRAPHICALLY REPRODUCED FOR HIS FURTHER USE.

Appellee's sole purpose in issuing the summonses to Appellants was to force Appellants to have the payroll checks described in the summonses photographically reproduced for Appellee's further use.

Appellee had been engaged in the examination of Appellant Corporation's books and records continuously since December 7, 1954. [R. 59] He had full opportunity to examine the payroll checks. [R. 120] Appellee had available for examination, and did examine extensively, *all* of the books and records sought by the summonses. [R. 51-52] Abstracts were made of all information contained on the checks. [R. 136-137] Adjustments to the income tax returns of each of the Appellants were made based upon information obtained by Appellee and Revenue Agent Calkins in the examination, [R. 44, 128] and such adjustments included adjustments based upon the information as to the "employee" of Appellant Corporation contained in Appellee's affidavit. [R. 44, 35] The Notices of Deficiency for each Appellant asserted a fraud penalty.

The information obtained by Appellee relative to this "employee" of Appellant Corporation, and on which Ap-

pellee hangs the necessity for the additional examination of the payroll records and checks, was obtained by Appellee in the month of March, 1955. [R. 140] The payroll records and checks were available for examination and examined from February, 1955, and for a considerable period thereafter. [R. 141] They were again requested on July 11, 1955, and delivered on July 13, 1955. [R. 141] At that time Appellee and Revenue Agent Calkins demanded the right to copy or photostat said checks. [R. 141-142] This demand was refused and Appellee and Revenue Agent Calkins stated that they did not need to examine the payroll records and checks. [R. 141]

Counsel for Appellee admitted after the filing of Appellee's petition, and prior to the hearings thereon, that the copying of the payroll checks, either photographically or through some photostatic process, would make unnecessary any further investigation by Appellee into the books and records of Appellant Corporation. [R. 147] Appellee testified at the hearing on his petition that it was his principal purpose in the examination sought by the summonses to photograph or photostat certain of the payroll checks to determine the validity of the endorsements on those checks and whether there had been forgeries. [R. 130]

The Appellee's position was aptly summarized by the lower court:

> "The Court: The petitioner says here that he never did finish, that he finally went to you, as I understand it, and he had this idea — he was tardy, yes — but he had the idea that he had better photostat these endorsements, and you said no." [R. 152]

Section 7602 authorizes the Secretary or his delegate "For the purpose of ascertaining the correctness of any return . . . (1) To *examine* any books, papers, records or other data which may be relevant or material to such inquiry; (2) To summon . . . any person having the possession, custody, or care of books of account containing entries relating to the business of the person liable for the tax . . ., to appear before the Secretary or his delegate at a time and place named in the summons and produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; . . ."

This section provides a method for securing the production of books and records before the Secretary or his delegate and authorizes the examination of such books and records.

Nowhere is there authority for Appellee to demand the right to photographically reproduce Appellants' books and records. Examination means to inspect. Section 7605(b) provides that a taxpayer shall not be subjected "to unnecessary examination" and further provides that "only one *inspection* of a taxpayer's books of account shall be made for each taxable year . . ." The right to photographically reproduce a taxpayer's books of account is tantamount to the right to seize such books of account. Section 7602 does not authorize a seizure.

It is clear that Congress did not intend to authorize the Secretary or his delegates to seize a taxpayer's books of account under the authority of Section 7602, since specific provision was made in the Internal Revenue Code for

seizures. Section 7607(b) of the Internal Revenue Code of 1954 provides: "For provisions relating to — (1) Searches and seizures see Rule 41 of the Federal Rules of Criminal Procedure." If in connection with an investigation it becomes necessary to seize the taxpayer's books and records, the Secretary or his delegate must follow the process set forth in Rule 41, and the safeguards therein provided. Subparagraph (g) of Rule 41 specifically provides that the term "property," as used in Rule 41, includes documents, books and papers.

A similar question arose in *U.S. v. Kraus*, 270 F. 578, (D.C.S.D. New York) where in an opinion by Judge Learned Hand in a case arising under the National Prohibition Act, it was held that the right given to revenue agents to inspect a taxpayer's records did not give them the additional right either to seize the records or to make copies without the taxpayer's consent.

The decisions of *U.S. v. Sherry*, 294 F. 684, (U.S.D.C. D.D. Ill.) and *Sellmayer Packing Co. v. Comm.*, 146 F. 2d 707, (CCA-4) appear to be contrary holdings. However, in the first case the seizure was made with consent, or without objection. In the second case, there was no objection to seized sales slips at time of trial, the evidence was cumulative, and it was established that there was an imminent possibility of destruction of the seized records.

IV

SECTION 7602, IRC 1954, AUTHORIZES A REVENUE AGENT TO EXAMINE A TAXPAYER'S BOOKS OF ACCOUNT FOR THE PURPOSE OF ASCERTAINING THE CORRECTNESS OF AN INCOME TAX RETURN. THIS AUTHORITY DOES NOT PERMIT A REVENUE AGENT TO MAKE AN EXAMINATION FOR THE ADMITTED PURPOSE OF SECURING EVIDENCE FOR A CRIMINAL PROSECUTION.

The examination being conducted by Appellee was for the admitted purpose of investigating possible criminal prosecution of Appellants. [R. 124] Appellee testified that in issuing the summonses one of the purposes which he had in mind was assisting in the preparation of a criminal case. [R. 134]

The fact that Appellee did not want to re-examine the records and checks for the purpose of adjusting or changing the Notice of Deficiency; that adjustments had been made to the income taxes of Appellants, and fraud penalties asserted, based upon the subject payroll records and checks; that his principal purpose in issuing the summonses was to photograph certain payroll checks to determine the validity of the endorsements; his counsel's admission that once photographic reproductions of the checks were made, further investigation by Appellee would be unnecessary; together with the nature and extent of the previous examinations, all point to the conclusion that the primary, if not sole, purpose of Appellee in issuing the summonses was to obtain information for a criminal prosecution.

The authority granted by Section 7602 is specifically limited to the purposes of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax, or transferee liability, or collecting any such liability. To permit this authority to be exercised for the purpose of securing evidence for a criminal prosecution would sanction a perversion of the authority granted.

In holding that a summons issued by a Special Agent of the Internal Revenue Service under Section 3614 of the Internal Revenue Code of 1939 [now Section 7602, IRC 1954] could not be used where *at least one* of the admitted purposes was to aid the Department of Justice in the prosecution of a criminal case, the United States District Court in *United States v. O'Connor,* 118 F. Supp. 248, (U.S.D.C. D. Mass. 1953) stated:

> "So far as this Court knows, Congress has never in criminal matters vested the executive with an unrestricted subpoena power to uncover information which might aid in the enforcement of criminal statutes and the preparation of criminal cases . . .
>
> "The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure. That is the inquisitorial body provided by our fundamental law to subpoena documents required in advance of a criminal trial, and in the preparation of an indictment or its particularization. See *Hale v. Henkel,* 201 U.S. 43, 26 S. Ct. 370, 50 L.Ed. 652.

"To encourage the use of administrative subpoenaes as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power. The power under Sec. 3614 [now 7602] was granted for one purpose, and is now sought to be used in a direction entirely uncontemplated by the lawgivers. The limitations implicit in every grant of power are that it will be used not colorably, but conscientiously for the realization of those specific ends contemplated by the donors of the power."

V

THE AUTHORITY IN SECTION 7602, IRC 1954, TO EXAMINE BOOKS AND RECORDS IS LIMITED TO THOSE WHICH ARE MATERIAL OR RELEVANT TO THE INQUIRY INTO THE CORRECTNESS OF THE RETURN UNDER INVESTIGATION. APPELLEE HAS FAILED TO SUSTAIN HIS BURDEN OF PROVING THAT THE BOOKS AND RECORDS WHICH HE DEMANDS ARE MATERIAL OR RELEVANT TO THE TAX LIABILITY OF THE PERSONS LIABLE THEREFOR AND THAT THE BOOKS AND RECORDS CONTAIN ITEMS RELATING TO THE BUSINESS OF THE PERSON LIABLE FOR THE TAX.

Section 7602, IRC 1954, requires that the books and records to be examined be material or relevant to the inquiry into the correctness of the return. In an action to

enforce an administrative summons issued under Section 7602, the burden is upon the revenue agent in the first instance to show that the demand is reasonable under all the circumstances and to prove that the books and records which he demands are material or relevant to the tax liability of the person liable therefor and that the books and records contain items relating to the business of the person liable to the tax.

> *Local 174, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al v. U.S.*, ... F. 2d ....., CCA-9, No. 14, 746, December 7, 1955.

Appellee alleged in his petition that the books and records sought by the summonses for the period July 1, 1951 to December 31, 1951 were material and relevant to the inquiry into the tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951. [R. 4 and 5] This was put in issue by Appellants. [R. 19-20] The lower court found that said books and records were material and relevant to the matter of the tax liability of Clifford O. Boren and Delta M. Boren for the calendar year 1951. [R. 60] No finding was made as to the materiality or relevancy for the calendar year 1950. The lower court concluded as a matter of law that Appellee was entitled to examine said books and records in connection with the calendar years 1950 and 1951.

It is Appellants' contention here that the court erred in concluding (1) that the books and records could be examined in connection with the year 1950; and (2) in finding from the evidence that the books and records were mate-

rial and relevant to the tax liability of Clifford O. Boren and Delta M. Boren for the calendar year 1951.

No evidence was introduced by Appellee showing in what manner, or at all, the books and records sought related to the tax liability of Clifford O. Boren or Delta M. Boren for the year 1950. The court did not find the records to be material or relevant for that year. The court's conclusion of law that Appellee is entitled to examine the books and records in connection with the year 1950 is therefore without foundation.

In connection with the year 1951, it was Appellee's obligation to prove that the books and records (1) contained entries relating to the business of Clifford O. Boren and Delta M. Boren for the year 1951, and (2) that the items or documents sought, and each of them, were material or relevant to the tax liability of both Clifford O. Boren and Delta M. Boren for the year 1951.

The evidence on the issue of materiality or relevancy introduced by Appellee consists of Appellee's affidavit, [R. 33-35] his testimony in response to questions by the Court, [R. 138-139] and the testimony of Revenue Agent Forrest P. Calkins. [R. 143-145]

The facts set forth in Appellee's affidavit, disregarding his speculations and conclusions, may be stated as follows: During the course of Appellee's investigation, he was informed that one of the persons carried as a salaried employee in the 1951 payroll account of Appellant Corporation was not employed by any of the Appellants. This "employee" performed no service for any of the Appellants

and rarely appeared on the premises of Appellant Corporation. An examination of Appellant Corporation's payroll records disclosed that Appellant Corporation carried the "employee" as a full time employee at 40 hours per week during the latter half of 1951. Weekly payroll checks issued by Appellant Corporation to the "employee" for the period June 29 to December 5, 1951 disclosed endorsements by the "employee" and Delta Boren. Appellee examined an income tax return filed in the name of the "employee" for the year 1951 which reported that the "employee" was paid the sum of $2,817.97 from Appellant Corporation as salary or wages. The "employee" denied under oath that she signed and filed or caused to be filed said return and denied working for either Appellant Corporation or Clifford O. Boren for more than 10 or 12 days in 1951.

For these facts to affect the tax liability of Appellants Clifford O. Boren and Delta M. Boren for the year 1951, it would be necessary to infer that the sums paid to the "employee" were not received by the employee, and further that such sums were received by Clifford O. Boren and Delta M. Boren. There is no evidence that the employee did not receive the checks or the amounts represented thereby. This cannot be reasonably inferred from her denial that she filed the tax return. There is no evidence that any part of the moneys paid to the employee was received by Clifford O. Boren or Delta M. Boren. The fact that the checks contained the endorsement of Appellant Delta M. Boren after the endorsement of the employee does not permit an inference that Appellant Delta M. Boren received any of the money. *A fortiori* no inference

could be made that Appellant Clifford O. Boren received any of the money.

Re-examination of the books and records would not determine these questions. They can be determined only by examination of the employee and Appellants Clifford O. Boren and Delta M. Boren.

Appellants attempted to examine Appellee in connection with the materiality of the examination sought by him. Appellants were immediately met with the strenuous assertion that the information was confidential. [R. 119] The confidential information of a revenue agent must, of course, be protected. However, we cannot lose sight of the fact that this is an ordinary lawsuit with each party bearing the burden of establishing by evidence the facts which he asserts give him the cause of action or defense. Although we occasionally find a Court making an inference from the assertion of the testimonial privileges of the Fifth Amendment, it is incongruous to take the position that a plaintiff can establish the most material fact in his case by asserting the existence of — but witholding — information which he deems confidential.

From Appellee's testimony in response to inquiries by the Court, it is obvious that Appellee had no knowledge of anything contained in the books and records which would be either material or relevant to the inquiry which he asserts he is making. [R. 138]

Revenue Agent Calkins in his testimony was a little more knowledgeable, but still did not disclose the existence in the books and records sought of anything material or

relevant to inquiry into the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950-1951. [R. 143-145]

It must also be noted that the lower court had the books and records before it. [R. 92] No examination of any kind was made by the Court of these books and records.

VI

NO EXAMINATION OF A TAXPAYER'S BOOKS AND RECORDS IS PERMITTED AFTER THE EXPIRATION OF THE STATUTE OF LIMITATIONS WITHOUT A DEFINITE FACTUAL SHOWING THAT FRAUD IS THE ISSUE OF THE RENEWED INQUIRY.

At the time Appellee issued his summonses, the period within which income taxes could be assessed, in the absence of fraud or a 25% omission from gross income, had expired for the calendar year 1951 as to Appellants Clifford O. Boren and Delta M. Boren. [R. 55]

Section 275(a) and (c) and Section 276(a), Internal Revenue Code of 1939.

No examination is permitted of a taxpayer's books after three years has elapsed from the filing of a return, unless there is a definite factual showing that fraud is the issue in the renewed inquiry. This showing must be made for each of the years involved, and as to each of the taxpayers involved.

> "Appellant's [Commissioner's] rights, if any, are statutory, and to obtain the relief granted by the statute he must bring himself within the terms thereof . . . An exception to the statute of limitations mentioned above provides no period of limitation on the collection of taxes in the case 'of a false or fraudulent return with intent to evade tax' . . . There is no allegation in the complaint, either specifically or of facts showing, that the return of the wife for 1930 was false or fraudulent and made with intent to evade tax."
> *Martin v. Chandis Securities Co.*, (CCA-9), 128 F. 2d 731.

It is Appellee's position that he has made a definite factual showing on fraud and therefore the statute of limitations has no applicability. [R. 154] The lower court found that Appellee has reasonable grounds to believe that Appellants Clifford O. Boren and Delta M. Boren "may have filed false or fraudulent returns of income taxes for the years 1950 and 1951, with intent to evade the taxes or may have willfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code." [R. 61]

The only evidence introduced by Appellee on this issue is contained in his affidavits. In his first affidavit which is dated September 19, 1955, he asserts that "Preliminary investigation of the taxable years 1950 and 1951 of the Borens shows that in excess of $40,000.00 of taxable income was not reported by the taxpayers as required by law." [R. 12] In his second affidavit, dated November 30, 1955, he asserts that Appellant Corporation carried on its payroll and issued weekly payroll checks to an

"employee" who worked for Appellants not more than 10 or 12 days in 1951; that the payroll checks bore the endorsement of the "employee" followed by the endorsement of Appellant Delta M. Boren; and that the "employee" denied filing a tax return which was filed in her name, reporting that she had received salary in the amount of $2,817.97 from Appellant Corporation. [R. 34]

Appellants respectfully submit that this evidence is not a definite factual showing that fraud is the issue in the renewed inquiry.

The statements contained in Appellee's first affidavit are nothing but Appellee's unsupported conclusions. There are no facts from which a Court could examine and conclude that Appellee had reasonable cause to believe that false and fraudulent returns were filed. Of course, Appellee should not be required to completely prove a fraud case in a proceeding such as this but he should be required to prove facts from which a Court could reasonably infer that the requisite elements of fraud were present.

It is the Court's function to determine from the evidence introduced the amount and nature of the receipt claimed not to have been reported, whether such receipt was taxable income and whether the taxpayers were required by law to report such receipt. Furthermore, it is the Court's function to determine from the evidence whether Appellee has reasonable cause to believe that false or fraudulent returns had been filed. On the issue of intent, the sole evidence is Appellee's assertion that no evidence has been discovered tending to show that the omission "was not done with the purpose and intent to evade or defeat the

payment of the taxpayer's taxes." [R. 12] Appellee makes no mention of whether he made any efforts to discover such evidence.

The factual assertions in Appellee's second affidavit likewise do not amount to a definite factual showing of fraud.

If there was evidence that the employee had not received the money and evidence that either Clifford O. Boren or Delta M. Boren had received it, together with evidence that the money was received by either Clifford O. Boren or Delta M. Boren as beneficial owners, and was intentionally unreported by the recipient, a sufficient factual showing probably would have been made. Here, however, there is no evidence that the money was not received by the employee nor is there evidence that it was received by Clifford O. Boren or Delta M. Boren in any capacity.

Furthermore, this information was possessed by Appellee in March, 1955 and he examined the books and records with this information in mind until July 15, 1955. No additional information has been obtained by Appellee. No justification therefore exists for making a renewed inquiry.

VII

THE FAILURE TO COMPLY WITH AN ADMINISTRATIVE SUMMONS IS NOT CONTEMPTUOUS CONDUCT AND IN AN ACTION TO ENFORCE SUCH SUMMONS AN ORDER TO SHOW CAUSE WHY THE SUMMONED PERSON SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR FAILURE TO OBEY SUCH SUMMONS FAILS TO STATE A CLAIM UPON WHICH PERSON COULD BE HELD IN CIVIL CONTEMPT.

Appellants moved the lower court to vacate the orders to show cause on the grounds (1) that Appellee's petition failed to state a claim upon which an attachment could issue as for a contempt, and (2) failed to state a claim upon which Appellants could be held in civil contempt. [R. 15] The lower court vacated those portions of the orders to show cause which required Appellants to show lants as for a contempt, but ordered that the remaining cause why an attachment should not issue against Appelportions of the orders to show cause should remain in effect. [R. 66]

It is Appellants' contention here that the orders to show cause failed to state a claim upon which Appellants could be held in civil contempt.

Orders to show cause were issued upon the *ex parte* application of Appellee to Appellants Clifford O. Boren and Delta M. Boren. [R. 9, 10, 14]

Each of the orders required the Appellant to whom it was directed to appear before the United States District

Court "... to show cause, if any there be, why an attachment should not issue against [Appellant] as for a contempt ..." Each of the orders also requires that the Appellants at said time show why they "... should not be held in civil contempt."

Where obedience to an administrative summons is declined, Section 7604(b) provides a procedure to bring the summoned person before the Court for a hearing of the case, for an order of the Court directing compliance with the administrative summons, and for the punishment of the summoned person if he defaults or disobeys the Court's order. Section 7604(a) of the Internal Revenue Code of 1954 confers jurisdiction upon the United States District Court "by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

Disobedience to administrative summons issued under authority of Section 7602 of the Internal Revenue Code of 1954 is not, *per se*, contempt. Contemptuous conduct arises only through disobedience of an order made by the Court directing that the summoned person appear and testify before the officers issuing the summons and produce the required records.

In *Isidore Wolrich, et al v. Naboshek, Gurian & Lindenbaum*, (1940) U.S.D.C. S.D.N.Y., 84 F. Supp. 481, the Court was called upon to consider the nature of the power conferred upon the Commissioner by Section 3614(a) of the Internal Revenue Code of 1939, now Section 7602 of the Internal Revenue Code of 1954. The Court there stated:

"Unlike the Collector of Internal Revenue, 26 U.S. C.A., Sec. 3615, the Commissioner has no power of subpoena in his own right. He can merely examine books and records and 'require' the attendance of persons having knowledge in the premises. If the party whose attendance is 'required' fails to attend, the Commissioner may ask the district court 'by appropriate process to compel such attendance, testimony, or production of books, papers, or other data'. 26 U.S. C.A. Sec. 3633. A subpoena, subpoena *duces tecum*, or order to appear and produce is patently an appropriate process. If it is disregarded, then contempt proceedings may ensue. The Collector, however, does not need the aid of the Court to compel attendance or production. If a Collector's summons is disregarded, contempt proceedings may ensue immediately. 26 USCA Sec. 3615."

Accord: *In the Matter of Albert Lindley Lee Memorial Hospital*, (1953) D.C. N.D.N.Y. No official report but see 53-1 USTC, Par. 9266, Affirmed CCA2d (1953) 209 F. 2d 122.

Section 7602 of the Internal Revenue Code of 1954 consolidated Sections 3614, 3615(a), (b) and (c) and 3632(a)(1) of the Internal Revenue Code of 1939. The consolidation of these sections into Section 7602 resulted in no material change from the law previously existing. The only change was a technical change by the Senate striking out the words "or any other person having knowledge in the premises" and inserting "or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Sec-

retary or his delegate may deem proper." *House of Representatives Committee Report No. 1357, Senate Report No. 1662,* and *Conference Report No. 2543,* 1954 U.S. Code Cong. and Adm. News, p.p. 4584, 5268, 5280, respectively.

The Federal Administrative Procedure Act expressly recognizes the right of parties subject to administrative subpoenas to contest their validity in the courts prior to subjection to any forms of penalty for non-compliance.

Section 1005(c), Title 5, U.S.C., provides in part: "Upon contest the Court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law, and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply."

Section 1005, Title 5, U.S.C., is applicable to the summonses issued by Appellee. *U.S. v. Aylmer V. Smith, et al,* (1949) D.C. Conn. 87 F. Supp. 293.

SUMMARY OF ARGUMENT AND CONCLUSION

The necessity for an examination by a revenue agent under summonses *duces tecum,* and the reasonableness of the scope of his examination, are proper matters to be inquired into in an action to enforce such summonses. Lack of necessity for the examination and unreasonableness of the scope of examination are proper defenses to the action. This is especially true where complete and detailed examinations have been previously made for the same purpose,

and where the examination is of a third party's books and records.

After one inspection of a taxpayer's books of account has been made, no re-examination can be made unless the Secretary of the Treasury, or his delegate, after investigation, require it and notify the taxpayer thereof in writing. Even where this is done, the Secretary or his delegate must be prepared to establish the necessity for the re-examination. If there is no necessity for the examination, there is an arbitrary abuse of power.

The authority given by the statute to a Revenue Agent is to "examine" the taxpayer's books and records. There cannot be read into this limited grant of power the authority to require a taxpayer's books and records to be photographically reproduced for the further use of the Revenue Agent. To do so would be to permit in effect a seizure of a taxpayer's books and records without providing the constitutional safeguards required for a seizure of a person's property.

The authority given to a revenue agent to "examine" is for the express purpose of ascertaining the correctness of an income tax return. This authority cannot be used for the admitted purpose of securing evidence for a criminal prosecution. To permit the use of administrative summonses for this purpose would sanction a perversion of the authority granted.

The authority to examine books and records is further limited to those which are material or relevant to the inquiry into the correctness of the return under investiga-

tion. The burden is upon the revenue agent in the first instance to prove that the books and records demanded are material or relevant to the tax liability of the person liable therefor, and that the books and records contain items relating to the business of the person liable for the tax.

This burden is not met by evidence casting doubt on the propriety of a payroll deduction by a third party taxpayer for a portion of one year; the assertion that the endorsement of one of the individual taxpayers appeared in the chain of endorsements on the payroll checks and after the employee's endorsement; and, the denial by the employee that she filed a return reporting such income, which return was in fact filed.

After the normal period of limitations for assessments of taxes has run, no examination can be made without a definite factual showing that fraud is the issue of the renewed inquiry. The revenue agent need not completely prove a fraud case but he should be required to prove facts from which the Court could reasonably infer that the requisite elements of fraud are present. Unsupported conclusions and isolated, unrelated facts do not constitute a definite factual showing that fraud is the issue of the *renewed* inquiry. Especially is this true when the revenue agent was possessed of the facts on which he premises the necessity for the renewed inquiry during the time he conducted the previous examinations.

The failure to comply with an administrative summons is not, *per se,* contemptuous conduct. Contemptuous con-

duct will arise only after the revenue agent has sought, and obtained, after a judicial hearing, an order directing compliance with the summons, and this order is not obeyed.

The Judgment and Order of the District Court should be reversed.

Respectfully submitted,

JOHN A. BRANT
Attorney for Appellants

APPENDIX

INTERNAL REVENUE CODE OF 1954

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of District Court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States Commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

SEC. 7605. TIME AND PLACE OF EXAMINATION.

* * *

(b) Restrictions on Examination of Taxpayer.—No taxpayer shall be subjected to unnecessary examination or

investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

SEC. 7607. CROSS REFERENCES.

* * *

(b) Search Warrants.—

For provisions relating to—

(1) Searches and seizures see Rule 41 of the Federal Rules of Criminal Procedure.

INTERNAL REVENUE CODE OF 1939

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276 —

(a) General Rule. — The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * *

(c) Omission from Gross Income. — If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such

tax may be begun without assessment, at any time within 5 years after the return was filed.

SEC. 276. SAME — EXCEPTIONS.

(a) False Return or No Return. — In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

SECTION 1005(c), TITLE 5, U.S.C.

(c) Subpoenas and production of evidence.

Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.